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Riverside, California

14
15 **UNITED STATES DISTRICT COURT**
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 **Danny Allen, Jr., Individually and**
18 **on Behalf of All Others Similarly**
19 **Situated,**

20 Plaintiffs,

21 v.

22 **Wells Fargo Auto Finance, Inc.,**

23 Defendant.

Case Number:

24 **'10CV 2657**
25 **CLASS ACTION**

W JMA

26 **Complaint for Damages and**
27 **Injunctive Relief Pursuant To The**
28 **Telephone Consumer Protection**
Act, 47 U.S.C § 227 et seq.

Jury Trial Demanded

ORIGINAL

INTRODUCTION

1
2 1. Danny Allen, Jr. ("Plaintiff") brings this class action for damages, injunctive
3 relief, and any other available legal or equitable remedies, resulting from the
4 illegal actions of Wells Fargo Auto Fiance, Inc. ("Defendant" or "Wells"), in
5 negligently, and/or willfully contacting Plaintiff on Plaintiff's cellular telephone,
6 in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq.,
7 ("TCPA"), thereby invading Plaintiff's privacy. Plaintiff alleges as follows upon
8 personal knowledge as to himself and his own acts and experiences, and, as to all
9 other matters, upon information and belief, including investigation conducted by
10 his attorneys.

JURISDICTION AND VENUE

11
12 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff seeks up to
13 \$1,500 in damages for each call in violation of the TCPA, which, when
14 aggregated among a proposed class number in the tens of thousands, exceeds the
15 \$5,000,000 threshold for federal court jurisdiction. Further, Plaintiff alleges a
16 national class, which will result in at least one class member belonging to a
17 different state than that of Defendant, providing jurisdiction under 28 U.S.C.
18 Section 1332(d)(2)(A). Plaintiff is informed and believed, and thereon alleges,
19 that Defendant is, and at all times mentioned herein was, a Delaware corporation,
20 and therefore, is a citizen of that state for diversity purposes. Defendant's
21 primary corporate headquarters are in Walnut Creek, CA. Therefore, both
22 elements of diversity jurisdiction under the Class Action Fairness Act of 2005
23 ("CAFA") are present, and this Court has jurisdiction.

24 3. Venue is proper in the United States District Court for the Southern District of
25 California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because Defendant
26 conducts business in the County of San Diego and is subject to personal
27 jurisdiction in this judicial district.
28

PARTIES

4. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).

5. Defendant is, and at all times mentioned herein was, a corporation and a “person,” as defined by 47 U.S.C. § 153 (10). Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of California and in the County of San Diego, and within this judicial district.

FACTUAL ALLEGATIONS

6. At all times relevant, Plaintiff was a citizen of the State of California. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (10).

7. Defendant is, and at all times mentioned herein was, a corporation and a “person,” as defined by 47 U.S.C. § 153 (10).

8. At all times relevant Defendant conducted business in the State of California and in the County of San Diego, within this judicial district.

9. Plaintiff applied for and auto loan through Defendant prior to 2010.

10. At no point did Plaintiff provide Defendant with his cellular telephone number and/or give Defendant prior express consent to call Plaintiff on his cellular telephone with the use of an autodialer and/or prerecorded message.

11. In early 2010, Plaintiff fell on hard times and became delinquent on one or more accounts.

12. On information and belief Defendant obtained Plaintiff’s cellular telephone number from a third party and/or in another manner, but not from Plaintiff.

13. Beginning on October, 2010 Defendant, or its agents, began calling Plaintiff, almost on a daily basis, on his cellular telephone via an “automatic telephone

1 dialing system,” as defined by 47 U.S.C. § 227 (a)(1) using “an artificial or
2 prerecorded voice” as prohibited by 47 U.S.C. § 227 (b)(1)(A).

3 14.The telephone number Defendant, or its agents, called was assigned to a cellular
4 telephone service for which Plaintiff incurs a charge for incoming calls pursuant
5 to 47 U.S.C. § 227 (b)(1).

6 15.These telephone calls constituted calls that were not for emergency purposes as
7 defined by 47 U.S.C. § 227 (b)(1)(A)(i).

8 16.Plaintiff did not provide Defendant or its agents prior express consent to receive
9 calls with an autodialer or by a prerecorded voice message on Plaintiff’s cellular
10 telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).

11 17.These telephone calls by Defendant or its agents violated 47 U.S.C. § 227(b)(1).

12 18.In response to receiving these illegal telephone calls, Plaintiff sent a written
13 demand to Defendant to cease and desist any and all communications with
14 Plaintiff, including, but not limited to, dialing Plaintiff’s cellular telephone by
15 automated dialer. Such written communication was received by Defendant on
16 November 15, 2010.

17 19.Despite this written request to stop the automated collection calls to Plaintiff’s
18 cellular telephone, Defendant then initiated additional calls to Plaintiff’s cellular
19 telephone beginning on November 27, 2010, and continuing almost on a daily
20 basis, via an “automatic telephone dialing system,” as defined by 47 U.S.C. §
21 227 (a)(1) using “an artificial or prerecorded voice” as prohibited by 47 U.S.C. §
22 227 (b)(1)(A).

23 20.The telephone number Defendant, or its agents, called was assigned to a cellular
24 telephone service for which Plaintiff incurs a charge for incoming calls pursuant
25 to 47 U.S.C. § 227 (b)(1).

26 21.These telephone calls constituted calls that were not for emergency purposes as
27 defined by 47 U.S.C. § 227 (b)(1)(A)(i).
28

1 22. Plaintiff did not provide Defendant or its agents prior express consent to receive
2 calls with an autodialer or by a prerecorded voice message on Plaintiff's cellular
3 telephone, pursuant to 47 U.S.C. § 227 (b)(1)(A).

4 23. These telephone calls by Defendant or its agents violated 47 U.S.C. § 227(b)(1).

5 **CLASS ACTION ALLEGATIONS**

6 20. Plaintiff brings this action on behalf of himself and on behalf of and all others
7 similarly situated ("the Class").

8 21. Plaintiff represents, and is a member of, the Class, consisting of all persons
9 within the United States who received any telephone call from Defendant or its
10 agents to said person's cellular telephone made through the use of any
11 automatic telephone dialing system or with an artificial or prerecorded voice,
12 which call was not made for emergency purposes or with the recipient's prior
13 express consent, within the four years prior to the filing of this Complaint.

14 22. Defendant and its employees or agents are excluded from the Class. Plaintiff
15 does not know the number of members in the Class, but believes the Class
16 members number in the tens of thousands, if not more. Thus, this matter should
17 be certified as a Class action to assist in the expeditious litigation of this matter.

18 23. Plaintiff and members of the Class were harmed by the acts of Defendant in at
19 least the following ways: Defendant, either directly or through its agents,
20 illegally contacted Plaintiff and the Class members via their cellular telephones
21 by using an autodialer and / or with a prerecorded voice message, thereby
22 causing Plaintiff and the Class members to incur certain cellular telephone
23 charges or reduce cellular telephone time for which Plaintiff and the Class
24 members previously paid, by having to retrieve or administer messages left by
25 Defendant during those illegal calls, and invading the privacy of said Plaintiff
26 and the Class members. Plaintiff and the Class members were damaged
27 thereby.
28

- 1 24. This suit seeks only damages and injunctive relief for recovery of economic
2 injury on behalf of the Class and it expressly is not intended to request any
3 recovery for personal injury and claims related thereto. Plaintiff reserves the
4 right to expand the Class definition to seek recovery on behalf of additional
5 persons as warranted as facts are learned in further investigation and discovery.
- 6 25. The joinder of the Class members is impractical and the disposition of their
7 claims in the Class action will provide substantial benefits both to the parties
8 and to the court. The Class can be identified through Defendant's records or
9 Defendant's agents' records.
- 10 26. There is a well-defined community of interest in the questions of law and fact
11 involved affecting the parties to be represented. The questions of law and fact
12 to the Class predominate over questions which may affect individual Class
13 members, including the following:
- 14 a. Whether, within the four years prior to the filing of this Complaint,
15 Defendant made any call (other than a call made for emergency purposes
16 or made with the prior express consent of the called party) to a Class
17 member using any automatic telephone dialing system or an artificial or
18 prerecorded voice to any telephone number assigned to a cellular telephone
19 service;
 - 20 b. Whether Plaintiff and the Class members were damaged thereby, and the
21 extent of damages for such violation; and
 - 22 c. Whether Defendant should be enjoined from engaging in such conduct in
23 the future.
- 24 27. As a person that received numerous calls using an automatic telephone dialing
25 system or an artificial or prerecorded voice, without Plaintiff's prior express
26 consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff will
27 fairly and adequately represent and protect the interests of the Class in that
28 Plaintiff has no interests antagonistic to any member of the Class.

1 28. Plaintiff and the members of the Class have all suffered irreparable harm as a
2 result of the Defendant's unlawful and wrongful conduct. Absent a class action,
3 the Class will continue to face the potential for irreparable harm. In addition,
4 these violations of law will be allowed to proceed without remedy and
5 Defendant will likely continue such illegal conduct. Because of the size of the
6 individual Class member's claims, few, if any, Class members could afford to
7 seek legal redress for the wrongs complained of herein.

8 29. Plaintiff has retained counsel experienced in handling class action claims and
9 claims involving violations of the Telephone Consumer Protection Act.

10 30. A class action is a superior method for the fair and efficient adjudication of this
11 controversy. Class-wide damages are essential to induce Defendant to comply
12 with federal and California law. The interest of Class members in individually
13 controlling the prosecution of separate claims against Defendant is small
14 because the maximum statutory damages in an individual action for violation of
15 privacy are minimal. Management of these claims is likely to present
16 significantly fewer difficulties than those presented in many class claims.

17 31. Defendant has acted on grounds generally applicable to the Class, thereby
18 making appropriate final injunctive relief and corresponding declaratory relief
19 with respect to the Class as a whole.

20 **FIRST CAUSE OF ACTION**

21 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**

22 **47 U.S.C. § 227 ET SEQ.**

23 32. Plaintiff incorporates by reference all of the above paragraphs of this Complaint
24 as though fully stated herein.

25 33. The foregoing acts and omissions of Defendant constitute numerous and
26 multiple negligent violations of the TCPA, including but not limited to each and
27 every one of the above-cited provisions of 47 U.S.C. § 227 et seq.
28

1 34. As a result of Defendant's negligent violations of 47 U.S.C. § 227 et seq,
2 Plaintiff and The Class are entitled to an award of \$500.00 in statutory
3 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

4 35. Plaintiff and The Class are also entitled to and seek injunctive relief prohibiting
5 such conduct in the future.
6

7 **SECOND CAUSE OF ACTION**
8 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
9 **TELEPHONE CONSUMER PROTECTION ACT**
10 **47 U.S.C. § 227 ET SEQ.**

11 36. Plaintiff incorporates by reference paragraphs 1 through 32, inclusive, of this
12 Complaint as though fully stated herein.

13 37. The foregoing acts and omissions of Defendant constitute numerous and
14 multiple knowing and/or willful violations of the TCPA, including but not
15 limited to each and every one of the above-cited provisions of 47 U.S.C. § 227
16 et seq.

17 38. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227
18 et seq., Plaintiff and The Class are entitled to treble damages, as provided by
19 statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. §
20 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

21 39. Plaintiff and The Class are also entitled to and seek injunctive relief prohibiting
22 such conduct in the future.
23

24 **PRAYER FOR RELIEF**

25 **Wherefore,** Plaintiff respectfully requests the Court grant Plaintiff and The Class
26 members the following relief against Defendant:

27 **FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF**
28 **THE TCPA, 47 U.S.C. § 227 ET SEQ.**

1 40. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1),
2 Plaintiff seeks for himself and each Class member \$500.00 in statutory
3 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

4 41. Plaintiff also seeks, pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief
5 prohibiting such conduct in the future.

6 42. Plaintiff also seeks any other relief the Court may deem just and proper.
7

8 **SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION**
9 **OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

10 43. As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §
11 227(b)(1), Plaintiff seeks for himself and each Class member treble damages, as
12 provided by statute, up to \$1,500.00 for each and every violation, pursuant to
13 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

14 44. Plaintiff also seeks, pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief
15 prohibiting such conduct in the future.

16 45. Plaintiff also seeks any other relief the Court may deem just and proper.
17

18 **TRIAL BY JURY**

19 46. Pursuant to the seventh amendment to the Constitution of the United States of
20 America, Plaintiffs are entitled to, and demand, a trial by jury.

21 Date: December 15, 2010

HYDE & SWIGART

22 By: 
23

24 Joshua B. Swigart
25
26
27
28

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law or by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Danny Allen Jr., Individually and on Behalf of All Others Similarly Situated

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Hyde & Swigart, 411 Camino Del Rio South Suite 301
San Diego, CA 92108, 619.233.7770

DEFENDANTS

Wells Fargo Auto Finance, Inc.

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

10CV 2657

W JMA

FILED

DEC 23 2010

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF |
|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 |
| Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

47 U.S.C. § 600

Brief description of cause:
ICPA

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

MANDATORY CLASS NOTICE

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

12/20/10

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # 21557 AMOUNT 350.00 APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

MS 12/23/10

ORIGINAL

CR

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS021557
Cashier ID: msweeney
Transaction Date: 12/23/2010
Payer Name: HYDE AND SWIGART ATTY AT LAW

CIVIL FILING FEE
For: DANNY ALLEN V WELLS FARGO
Case/Party: D-CAS-S-10-CV-002657-001
Amount: \$350.00

CHECK
Check/Money Order Num: 4342
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

There will be a fee of \$45.00
charged for any returned check.